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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL CO.,
Petitioner,

VS.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent,

and

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

WESTERN ADDITION COMMUNITY ORGANIZATION, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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instance where the employees engaged in publicity activities outside the work setting or otherwise did not interfere with the collective bargaining relationship. The court below prohibited employee discipline here notwithstanding (1) that the employees had necessarily "rendered ineffective the method of remedying grievances chosen by their collective bargaining representative and provided by the collective bargaining agreement", and (2) that this method had been successfully pursued in good faith, in accord with the suggestions of both state and federal civil rights representatives, in order to provide "some orderly legal procedures that would have some long lasting effect". *Id.* at 24, 27, 83, 85 and 90. In lieu of this manifestly reasonable exercise of the Union's bargaining discretion (see *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338 (1952)) the Court of Appeals imposed a standard which, according to the Board, the "expert" entrusted by Congress to "effectuate national labor policy",[3] is impossible to administer and in direct conflict with the fundamental principles of such federal policy.

Both the Act as well as the collective bargaining agreement in this case, which contained a no-strike and general arbitration clause (Pet. App. in No. 73-696, p. 3), required not only that the Emporium "agree to bargain only with the union, but [that its] employees agree to bargain only through the union". *N. L. R. B.* v. *Draper Corporation*, 145 F. 2d at 204. The Union, nevertheless, in order to comply with the lower court's "most expedient and efficacious means" test (*Id.* at p. 28), was apparently required to picket the Company to protest the alleged discriminatory practices. And the Company was apparently required to tolerate, if the Union declined to take such action, unlawful[4] picketing by one or more self-styled minority

3. *Medo Photo Supply Corporation* v. *N. L. R. B.*, 321 U. S. at 684; *N. L. R. B.* v. *Erie Resistor Corp.*, 373 U. S. 221, 236 (1963).

4. Section 8(b)(7) of the Act prohibits a "labor organization", a term encompassing the dissident employees in this case, from picketing an employer where, as here (see n. 2, *supra*), "an object"

representatives seeking their own bargaining rights. The area of employment discrimination was thus considered, similar to the Third Circuit's erroneous view in *Gateway Coal Company* v. *United Mine Workers*, 94 S. Ct. 629 (1974), that questions concerning safety were to be treated differently than other industrial disputes and not be subject to arbitration or an implied obligation not to strike, as another alleged "sui generis" exemption to "the usual federal policy [which] encourages arbitration of labor disputes." Indeed, the discharged employees here claimed to represent only certain minority groups; presumably, under the rationale of the court below, other individuals would similarly have the right to assert representative rights for other or even the same racial, sexual or religious groupings of employees and thereby further splinter the bargaining unit. As Mr. Justice Douglas recently admonished in *DeFunis* v. *Odegaard*, ____ U. S. ____ (April 23, 1974; dissenting opinion), quoting from *Hughes* v. *Superior Court*, 339 U. S. 460, 464 (1950): "If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights . . ." An employer confronted by such a situation would surely have an impossible task of ascertaining which, if any, of these alleged representatives he owed a bargaining obligation particularly where, as would be likely, their various demands conflicted.

These are only a few[5] of the pandora's box of problems occasioned by the decision below. As the Board properly con-

is to force bargaining with the pickets and the employer has lawfully recognized another labor organization. See Note, 87 Harv. L. Rev. 656, 662-4 (1974). In these circumstances, as this Court recognized in *McDonnell Douglas Corporation* v. *Green*, 411 U. S. 792 (1973), relying on Labor Act authority permitting the discharge of employees who engage in an illegal strike, "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it."

5. Other potential difficulties are discussed in Note, 79 Harv. L. Rev. at 659-662: the difficulty of an employer choosing whether to discipline dissident employees and run the risk of an Emporium 8(a)(1) violation or, on the other hand, bargain with the minority

cluded, and other circuits have recognized in similar circumstances,[6] protection of the conduct here involved "would seriously undermine the right of employees to bargain collectively . . . handicap and prejudice the employees' duly designated representative . . . and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid collective agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement". Pet. App. in No. 73-696, pp. 104-105.

2. Neither Title VII nor this Court's decision in *Alexander* v. *Gardner-Denver Company*, 94 S. Ct. 1011 (1974), command a different result. Here, unlike *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31 (1941), the Board has not promulgated a specific remedy which directly vitiated the effectiveness of a separate statutory prohibition. As the Board demonstrates in its petition (pp. 16-18), if the employees' activities here "were contrary to the policies of, and thus unprotected by, the National Labor Relations Act . . . they would not be sanctioned by Section 704(a) of Title VII." Nothing in Title VII requires an abandonment by the Board of "an independent inquiry into the requirements of its own statute" nor "mechanical . . . accept [ance of] standards elaborated by another agency under a different statute for wholly different purposes." *Local 1976, Carpenters* v. *N. L. R. B.*, 357 U. S. 93, 111 (1958).

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and risk a potential 8(a)(5) refusal to bargain charge by the incumbent union; the frustration of the voluntary compliance policy underlying Title VII; the unfair dilemma faced by the statutory bargaining representative even if it correctly determines, contrary to the good faith belief of certain employees, that no discrimination exists; and the burden placed on the Labor Board in developing standards as to the scope of Title VII and the danger that such standards may conflict with the criteria utilized by the E. E. O. C. and the courts.

6. See, e.g., *N. L. R. B.* v. *Tanner Motor Livery, Ltd.*, 419 F. 2d 216 (9th Cir. 1969), and 349 F. 2d 1 (9th Cir. 1965); *N. L. R. B.* v. *Shop Rite Foods, Inc.*, 430 F. 2d 786 (5th Cir. 1970); and *Moore* v. *Sunbeam Corporation*, 459 F. 2d 811 (7th Cir. 1972).

This is also the lesson of *Alexander*. There this Court held that a prior arbitral decision does not foreclose a private right of action under Title VII; that the Civil Rights Act "manifests a congressional intent to allow an individual to pursue independently his rights under Title VII and other applicable state and federal statutes." 94 S. Ct. at 1019. *Alexander* in no way suggests, however, that such other rights may be pursued in a manner which defeats the policies—as, e.g., those expressed in Sections 9 and 8(b)(7) of the Labor Act (see n. 4, *supra*) —of the other legislation. The legislative history of Title VII relied on in *Alexander* demonstrates that Congress sought only to preserve—not extend or alter—other existing remedies and to leave those laws unaffected by the Civil Rights Act. 94 S. Ct. at 1019-20, n. 9.

3. The decision below is predicated, in large part, on the assumption that, because "the Union and the [dissidents] . . . were *not* working at cross-purposes," any interference with the collective bargaining process or inconvenience to the Company was "limited". Pet. App. in No. 73-696, pp. 24-29 (emphasis the court's). This assumption is incorrect. While there may have been agreement as to the ultimate goal of eradicating employment discrimination, "disputes over tactics and timing can be as disruptive as disputes over goals. . . . It is thus legally possible for the union and the dissidents to take different positions on the use of quotas, seniority systems, training programs and other forms of affirmative action". Note, 87 Harv. L. Rev. at 661-662. In such a case, the effectiveness of the union and its united front in negotiations with management will necessarily be undermined. The usual labor organization accommodation between competing interests and desires, involving "a melange of power, numerical strength, mutual aid, prejudice and emotion" (Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 626-27 (1956)), would no longer be feasible. There was, therefore, as Judge Wyzanski correctly perceived below, an inherent conflict between the Union and the dissident employees and a corollary interference with the collective bar-

gaining process. App. Pet. in No. 73-696, pp. 43-45; cf. Note, *Title VII and NLRB: Protection of Extra-Union Opposition to Employment Discrimination*, 72 Mich. L. Rev. 313, 324-25 (1973); Gould, *Black Power in the Unions: The Impact on Collective Bargaining Relationships*, 79 Yale L. J. 46, 59-60 (1969);[7] and *N. L. R. B.* v. *R. C. Can Co.*, 328 F. 2d 974, 979 (5th Cir. 1964) (dissident activities are protected only "so long as the means used do not involve a disagreement with, repudiation or criticism of a policy or decision previously taken by a union, such as, for example, a no-strike pledge, a cooling off period, or the like during negotiations").[8]

4. The self-help measures utilized by the dissident employees also cannot be justified on the ground that there was no other effective alternative to rectify the alleged discrimination. To the contrary, there are a wide variety of legal weapons to redress such grievances: unfair labor practice charges and other sanctions under the National Labor Relations Act;[9] private, E. E. O. C. or Attorney General "pattern and practice" actions, including suits for temporary injunctive relief,

7. There are, as Gould notes, a wide variety of related areas where a union-dissident conflict might become even more apparent, for example, a dissident demand for reparations based on alleged company involvement in the subrogation of Black employees or a minority work stoppage aimed at forcing the company to recognize the anniversary of Martin Luther King's death as a holiday. Gould, 79 Yale L. J. at 63-64.

8. Even the permissive *R. C. Can* approach, a view restricted and criticized by the majority of decisions which have protected minority picketing "only when it is not disruptive of orderly collective bargaining, regardless of whether the activity might be deemed to be supportive of the union's position" (App. Pet. in No. 73-696, p. 17, and n. 26), must admittedly be "applied with great care . . . [lest it not] allow minority action in a broad range of situations and permit unrestrained undercutting of collective bargaining." *N. L. R. B.* v. *Shop Rite Foods, Inc.*, 430 F. 2d 786, 790-91 (5th Cir. 1970).

9. See, e.g., *Packinghouse Workers Union* v. *N. L. R. B.*, 396 F. 2d 677, 683 (D. C. Cir. 1968); *N. L. R. B.* v. *Tanner Motor Livery, Ltd.*, 419 F. 2d 216, 218-19 (9th Cir. 1969); and *Local No. 12, Rubber Workers* v. *N. L. R. B.*, 368 F. 2d 12 (5th Cir. 1966), *cert. den.*, 389 U. S. 837 (1967).

under Title VII;[10] varied relief under state and federal civil rights statutes, executive orders and regulations; and a contractual remedy under the anti-discrimination provisions of the Company-Union collective bargaining agreement. Reliance on the Union's efforts to resolve the problem contractually, moreover, as *Alexander* makes clear (see p. 7, *supra*) would not bar resort to any of these other forums; the various remedies are parallel and overlapping. Finally, and perhaps most significant, a labor organization's duty of fair representation stands as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 181 (1967); *Vaca* v. *Sipes*, 386 U. S. 171, 182 (1967). As the court below recognized, "if the Union were not working to eradicate racially discriminatory employment practices, it would not only be violating its statutory duty of fair representation . . . but also committing an unfair labor practice . . ." App. Pet. in No. 73-696, p. 26, n. 38.

If, nevertheless, additional assurance is necessary to insure that unions properly represent minority employees, it is these other remedies, and in particular the duty of fair representation, that should be altered. A more stringent standard as to whether a labor organization has, in fact, made a good faith effort to remedy discrimination may, for example, be imposed. Such a modification would place the burden of action on the union purportedly at fault who would also be privy, unlike an employer, to intra-union deliberations as to whether there is reasonable cause to believe discrimination exists and, if so, whether the "most expeditious and efficacious means" of rectification have, in fact, been utilized. Surely this is a better solution, if one is needed, than radically restructing the majority-rule concept underlying our national labor policy.

10. See Sections 706(e) and (f) and 707 of Title VII, 42 U. S. C. §§ 2000e-5(e-f) and 2000e-6 (1970). In such cases a court may appoint counsel, award attorneys' fees and grant relief or order affirmative action on an individual or class-wide basis. See Sections 706(e), (g) and (k) of Title VII, 42 U. S. C. §§ 2000e-5(e), (g) and (k) (1970).

CONCLUSION

For the reasons stated above, as well as for those presented by the Petitioners, the decision of the court below should be reversed.

Respectfully submitted,

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